STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2014
v	No. 314561 Wayne Circuit Court
DINO LENIEL VANN, a/k/a DINO LENIEL VANN, JR., Defendant-Appellant.	LC No. 12-004778-FH

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of resisting arrest causing bodily injury, MCL 750.81d(2). Defendant was acquitted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. He was sentenced, as a third habitual offender, MCL 769.11, to 30 to 96 months' imprisonment. For the reasons set forth in this opinion, we affirm.

This appeal arises from an incident that occurred on April 19, 2012. At about 11:50 p.m., four officers in an unmarked police car observed a Buick sedan stationary in the middle of a residential street with a man and woman speaking to the driver at the front driver's side window. Officer Smith drove the unmarked police car, Officer Adams sat in the front passenger seat, Officer Jamil sat in the rear driver's side seat, and Officer Karls sat in the rear passenger seat. Suspecting that a narcotics transaction was underway, the officers attempted to stop the sedan by activating their red and blue lights, pulling their unmarked police car nose-to-nose with the sedan at a distance of between 6 and 10 feet, and verbally ordering the driver to "shut off of the vehicle." As the officers exited the police car, the driver of the sedan accelerated around the driver's side of the police car, striking at least one officer, and drove away. The sedan was found, abandoned, approximately one-half mile from the scene.

Defendant first argues that there was insufficient evidence to sustain his conviction or, in the alternative, that the verdict was against the great weight of the evidence. In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This

Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id*. A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

"Under MCL 750.81d(1), the elements required to establish criminal liability are: (1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010). In addition to these two elements, MCL 750.81d(2) requires that the prosecution prove that the defendant's actions caused the officer "a bodily injury requiring medical attention or medical care."

In his brief, defendant concedes that Officer Smith received a contusion and was advised to take an over the counter medication to control pain. Defendant further concedes that Smith went to the hospital "to rule out injury," but argues that Smith "did not suffer an actual physical injury sufficiently severe to require medical attention." Hence, the essence of defendant's first subargument is that Smith's injury was not *severe* enough to justify charging defendant under MCL 750.81d(2). Contrary to defendant's argument, the statute does not contain the words "sufficiently" or "severe," or any variant thereof. Therefore the essence of his argument is premised on an inaccurate interpretation of MCL 750.81d(2).

Additionally, defendant argues that the trial court found that medical attention was necessary to determine the severity of the injury. Therefore, he asserts, ruling out the necessity for medical treatment is not the same as medical treatment. This argument is unpersuasive. We are, however, persuaded by this Court's decision in *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 570 (2011), in which this Court, interpreting OV 3, MCL 777.33(1)(d), held that "'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." Similarly, MCL 750.81d(2) imposes criminal sanctions on "[a]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person."

"[S]tatutes that relate to the same subject or that share a common purpose are in para [sic] materia and must be read together as one." *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007) (holding that "[t]he probation statute and the sentencing guidelines must be construed together" due to the in pari materia rule). Because MCL 777.33 (OV 3) and MCL 750.81d(2) share a common purpose of penalizing crimes that cause bodily injury to the victim requiring medical care, OV 3 and MCL 750.81d(2) are in pari materia, and it is appropriate to look to case law interpreting the former for guidance on the elements of the latter. In this case, there was evidence that Smith perceived his injury as an "unwanted physically damaging consequence." *McDonald*, 293 Mich App at 298. He testified that, after the sedan drove away, he felt a burning sensation in his leg and sat on a curb awaiting an ambulance, which arrived in "four to five minutes" and took him to Oakwood Hospital, where he stayed for about five hours, received an

over-the-counter painkiller, and was told that his leg injury was a "contusion." Officer Shawn Adams ("Adams") testified that Smith was limping before the ambulance arrived. Smith also testified that he took three days off work as a result of the injury. Viewed in the light most favorable to the prosecution, the totality of the evidence submitted at trial was sufficient for the jury to have found that Smith's injury, caused by defendant's action, required medical attention or care. Accordingly, defendant is not entitled to relief

Defendant next argues that there was insufficient evidence to identify him as the driver of the sedan. We concur with defendant's assertion that identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

Officer Robert Karls testified that, while he was unsure that defendant was the suspect based on the photograph defendant's mother provided—because the man in the photograph did not have braids in his hair and the photograph was taken from a distance—Karls was "100 percent sure" that defendant was the driver of the sedan after viewing defendant's driver's license photograph. Karls also said that, after exiting the police car, he pointed his flashlight at the Buick sedan driver's face. On direct examination, Karls testified that he could not see the driver of the sedan until Karls exited the police car; at the preliminary examination, he told the prosecutor he had a "[f]airly good" view of the defendant from his position in the front passenger seat of the police car. Danielle Adams ("Danielle") and her boyfriend, Johnathon Hendrickson, the man and woman officers saw standing near the front driver's side window of the sedan, each selected defendant from a photographic lineup on the morning of the incident, although at trial they both denied that defendant was the driver.

To defendant, these inconsistencies add up to the conclusion that there was insufficient evidence to identify him as the driver of the sedan. Whether to accept the first or second version of the testimony of Karls, Danielle, and Hendrickson, however, is a question that concerns witness credibility and the weight of the evidence, and thus was for the jury to resolve. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). Further, in addition to the testimony of one police officer and two civilian witnesses, the prosecution demonstrated that the abandoned Buick sedan was registered to defendant and contained bags of narcotics with defendant's fingerprints on them. Given this evidence, the prosecution satisfied its burden of proving the elements of resisting arrest causing bodily injury, MCL 750.81d(2), beyond a reasonable doubt.

Defendant's brief argument that the jury verdict was against the great weight of the evidence lacks merit because it is explicitly premised on the same arguments, related to identity and the severity of Smith's injury, that he raised above, each of which is meritless. Additionally, we have held that: "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

Defendant next argues, in three subarguments, that he received ineffective assistance of counsel.

"Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). The United States and Michigan Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670, and is given "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007). "[D]eclining to raise objections . . . can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Strickland*, 466 US at 689; *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defendant's first ineffective-assistance claim is that his trial counsel failed to challenge the photographic lineups, which defendant argues were unduly suggestive because they contained only one black male with braided hair and "it is hard to imagine that no other photographs of African[-]American men with braids were available." "The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009).

Defendant has not shown that his attorney's failure to challenge the photographic lineups fell below prevailing professional norms, *Uphaus*, 278 Mich App at 185, because there was no basis for suppressing the lineup identifications. While Danielle testified that defendant's photograph was the only one she was shown in which the subject had braided hair, she did not suggest that she identified defendant for that reason, and Michigan State Police Detective-Sergeant Charles Greenway, who showed Danielle the photographs, testified that Danielle hesitated but "didn't tell [him] she was not sure" about her selection after Greenway told her to "take her time." None of the cases defendant cites suggests that hairstyles among lineup participants must be varied in order to reduce suggestiveness. Further, there is no evidence that Greenway (who did not create the lineups, but only showed them to Danielle and Hendrickson) or the creator of the lineups knew in advance that Danielle had identified the driver of the sedan as having braided hair. Evidence at trial revealed that Danielle told Inkster police that the driver had braids, however, the lineup was administered by the Michigan State Police.

Declining to raise objections can often be consistent with sound trial strategy, and effective assistance does not require trial counsel to make futile objections. *Unger*, 278 Mich App at 242, 256-257. The closing argument made by defendant's attorney invited the jury to consider whether the four Inkster police officers attempted to engage in a cover-up after

wrongfully firing at least one of their weapons at the fleeing Buick sedan. This focus on the officers' credibility was in the realm of reasonable trial strategy, which this Court does not second-guess. *Odom*, 276 Mich App 407.

Moreover, given the other evidence implicating defendant, including Karls' identification of him and the sedan being registered in his name and containing bags of narcotics with his fingerprints on them, defendant cannot show that, "but for counsel's error, the result of the proceedings would have been different." *Uphaus*, 278 Mich App at 185. Therefore, his first claim of ineffective assistance of counsel lacks merit.

Defendant also argues that his trial counsel should have impeached Karls' trial testimony with his preliminary-examination testimony. This portion of defendant's ineffective-assistance argument fails to summarize Karls' trial or preliminary-examination testimony, fails to argue why trial counsel's failure to impeach Karls fell below an objective standard of reasonableness under the prevailing professional norms, and fails to argue how proper impeachment would have altered the outcome of the trial. *Uphaus*, 278 Mich App at 185. In fact, defendant "acknowledges that trial counsel impeached [Karls] somewhat," but believes that "additional impeachment on the issue was available, and should have been utilized." What constituted that "additional impeachment" is not specified. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Even if defendant had elaborated on this argument, it would lack merit because, contrary to defendant's assertions, trial counsel successfully brought out the inconsistency in Karls' identification: specifically, that Karls said at the preliminary examination that he had a "[f]airly good" view of the Buick sedan's driver from his position in the front passenger seat of the police car, but testified at trial that he could not see the driver until he exited the police car. At that point, it was for the jury to weigh the evidence and consider Karls' credibility. *Eisen*, 296 Mich App at 331; *Kissner*, 292 Mich at 534.

Defendant's final ineffective-assistance claim is that his trial counsel failed to request corrections to the scoring of OV 3 and to the content of the presentence investigation report. Because defendant has failed to brief this issue, this Court need not address it. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.") In any case, defendant cannot show that he was prejudiced by this error, *Uphaus*, 278 Mich App at 185, because the trial court reduced the scoring of OV 3 from 10 points to zero points following defendant's postjudgment motion, granting defendant the same relief he argues that his trial counsel should have sought. Accordingly, defendant is not entitled to relief on this issue.

Defendant next argues that he is entitled to resentencing based on two erroneously scored offense variables.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of

the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). If a minimum sentence is within the appropriate guidelines, this Court must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Gibbs*, 299 Mich App 473, 484; 830 NW2d 821 (2013).

A sentencing court must, absent substantial and compelling reasons, impose a minimum sentence, not to exceed two-thirds of the statutory maximum, within the statutory guidelines on defendants convicted of enumerated[1] felonies. MCL 769.34(2); MCR 6.425(D); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence," *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006)), and may rely on reasonable inferences from the record, *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). A scoring error requires resentencing "only if the error alters the recommended minimum sentence range under the legislative sentencing guidelines." *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). In his brief on appeal, defendant "acknowledges that these changes will not alter his guidelines" range.

Resisting arrest causing bodily injury, MCL 750.81d(2), is a class F offense. MCL 777.16d. Defendant's PRV score is 60, which corresponds to PRV level E. MCL 777.67. Following the corrections made at the sentencing hearing, defendant's OV score was 32, which corresponds to OV level II. MCL 777.67. As a result of defendant's postjudgment motion, the trial court reduced the score for OV 3 from 10 to zero points, thereby reducing defendant's OV score from 32 to 22, which did not change the OV level. MCL 777.67. Defendant argues that OV 1, which was scored at 10 points, should have been scored at zero, and that OV 2, which was scored at one point, should also have been scored at zero. An 11-point reduction in the OV score, as defendant requests, would reduce it from 22 to 11, which still corresponds to OV level II. MCL 777.67.

Resentencing is not warranted because correction of the alleged errors would not alter the calculation of defendant's guidelines range. *Phelps*, 288 Mich App at 136. Defendant, as a third habitual offender, MCL 769.11; MCL 777.21(3)(b), was subject to a sentencing guidelines range of 10 to 34 months' imprisonment, MCL 777.67; MCL 777.21(3)(b), and he was sentenced to a minimum of 30 months' imprisonment. Because defendant's minimum sentence was within the legislative sentencing guidelines, this Court must affirm the sentence. MCL 769.34(10); *Gibbs*, 299 Mich App at 484.

Even if the proposed changes would change defendant's guidelines range, the scoring of OVs 1 and 2 was supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. OV 1, concerning the aggravated use of a weapon, was scored 10 points because the "victim was touched by any other type of weapon" than a firearm, knife, explosive device, or harmful

[1] MCL 777.11 *et seq.*

biological, chemical, or radioactive substance. MCL 777.31(1)(d). In this case, the victim was struck with a motor vehicle. OV 2, concerning the lethal potential of the weapon possessed or used, was scored one point because "[t]he offender possessed or used any other potentially lethal weapon" than a firearm, knife, explosive device, or harmful biological, chemical, or radioactive substance. MCL 777.32(1)(e). Smith testified that when the motor vehicle found to be driven by defendant cleared the front of the police car, it "veered back toward [Smith], pushing [him] back" into the police car, and the bumper struck Smith on the inside of his left knee, causing him pain and a contusion. Officer Jamil saw the sedan strike Smith, and Adams assisted the limping Smith to the curb afterward. This was sufficient evidence that defendant used his motor vehicle as a potentially lethal weapon against Smith.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto